

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 3, 2004 appellant, then a 41-year-old transportation security screener, filed a traumatic injury claim alleging injury to her left knee that day when a bag fell on her knee as she was loading it to be screened. OWCP accepted the claim for a left knee contusion, sprain torn medial meniscus and authorized left knee arthroscopic surgery, which occurred on December 20, 2006. It accepted appellant's claims for recurrences of disability beginning January 7, 2008 and June 20, 2009.²

On October 6, 2009 the employing establishment offered appellant a revised limited-duty job beginning that day as a modified transportation security screener based on the restrictions noted by her physician. The physical limitations included intermittent lifting of up to 15 pounds; continuous sitting for up to eight hours, no squatting or kneeling, intermittent walking and standing for up to three hours; intermittent bending, pushing, pulling, repetitive movement and operating a vehicle, reaching over shoulder; and intermittent climbing stairs and grasping, for up to eight hours. The full-time annual wages were \$36,446.00 and the offer was effective October 6, 2009. Appellant accepted the offer on October 7, 2009 and returned to work that day.

An October 6, 2009 report from Dr. S.G. Elias, a treating physician specializing in orthopedic surgery, provided work restrictions of no pushing, pulling, lifting and carrying more than 15 pounds and no climbing or squatting.

By decision dated December 7, 2009, OWCP determined that appellant's actual earnings as a modified transportation screener fairly and reasonably represented her wage-earning capacity. It noted that she worked in the position for more than 60 days and found the position was suitable. OWCP found that appellant's weekly pay rate as of November 6, 2006, the date disability began, was \$668.12. The current weekly pay rate for her job and step when injured was \$777.57. Appellant's weekly pay rate for her current position was \$805.76. OWCP found she had zero percent loss of wage-earning capacity as her current weekly pay rate exceeded the current pay of the job she held when injured.

In a letter dated December 21, 2009, appellant's counsel requested a telephonic hearing before OWCP's hearing representative, which was held on March 23, 2010. At the hearing, appellant testified that she was doing her regular work, but with accommodations for her restrictions.

By decision dated June 28, 2010, OWCP's hearing representative affirmed the December 7, 2009 loss of wage-earning capacity decision.

² Appellant filed claims for wage loss for the period September 13 to 26 and September 27 to October 5, 2009, which OWCP denied by decision dated November 25, 2009. By letter dated November 28, 2009, appellant's counsel requested a telephonic hearing before OWCP's hearing representative. As OWCP's hearing representative has not issued a final decision on this wage-loss issue, the Board has no jurisdiction to review it for the first time on appeal. 20 C.F.R. § 501.2(c)(2); *see Annette Louise*, 54 ECAB 783 (2003).

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in benefits.³ Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if such earnings fairly and reasonably represent her wage-earning capacity.⁴ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, will be accepted as such measure.⁵

When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁶ The procedure manual notes that reemployment may not be suitable if the job is part time, seasonal or of a temporary nature.⁷ After the employee has worked for 60 days, OWCP will determine whether her actual earnings represent her wage-earning capacity.⁸ In so doing, OWCP will apply the *Shadrick* formula in determining the claimant's monetary entitlement.⁹

ANALYSIS

OWCP accepted that on August 3, 2004 appellant sustained left knee contusion, sprain torn medical meniscus due to performing her work duties on that date and authorized left knee arthroscopic surgery, which occurred on December 20, 2006. In a December 7, 2009 decision, it determined that her actual wages as a modified transportation security screener fairly and reasonably reflected her wage-earning capacity. OWCP found appellant had no loss of wage-earning capacity as her actual earnings exceed the date-of-injury current pay rate. By decision dated June 28, 2010, its hearing representative affirmed the December 7, 2009 decision.

In reaching its determination of appellant's wage-earning capacity, OWCP properly found that she had received actual earnings as a modified transportation security screener for at least 60 days. Appellant had worked in the position since October 7, 2009 before OWCP issued

³ A.W., 59 ECAB 593 (2008); *Connie L. Potratz-Watson*, 56 ECAB 320 (2005).

⁴ M.A., 59 ECAB 624 (2008); *Sherman Preston*, 56 ECAB 607 (2005). See 5 U.S.C. § 8115(a).

⁵ S.B., 59 ECAB 482 (2008); *Lottie M. Williams*, 56 ECAB 302 (2005).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009).

⁷ *Id.* See K.S., Docket No. 08-2105, issued February 11, 2009; *Connie L. Potratz-Watson*, *supra* note 3.

⁸ K.S., *supra* note 7.

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009). See also *Albert C. Shadrick*, 5 ECAB 376 (1953). This has been codified by regulation at 20 C.F.R. § 10.403.

its December 7, 2009 decision.¹⁰ According to the evidence of record, the job offer was in accordance with the restrictions provided by her attending physician. The evidence of record also confirms that OWCP took the appropriate steps to obtain appellant's pay rate information from the employing establishment before issuing the decision on whether the modified transportation security screener, with wages of \$805.76 per week, represented her wage-earning capacity. OWCP compared appellant's actual earnings as a modified transportation security screener with the wages she was receiving as of November 6, 2006, the date disability began. As appellant's actual earnings met or exceeded those she earned at the time of her recurrence, it properly reduced her wage-loss compensation to zero.

OWCP also properly found that appellant's actual wages as transportation security screener fairly and reasonably represented her wage-earning capacity. The record does not establish that the modified transportation security screener position constitutes sporadic, part-time, seasonal or temporary work. Moreover, the record does not reveal that the position is a makeshift position designed for appellant's particular needs.¹¹ There was no evidence that appellant's wages did not fairly and reasonably represent her wage-earning capacity.

As noted, generally wages earned are the best measure of wage-earning capacity. The evidence of record supports OWCP's finding that actual earnings in this case fairly and reasonably represented wage-earning capacity pursuant to 5 U.S.C. § 8115.

CONCLUSION

The Board finds that OWCP properly determined that appellant's actual earnings as a modified transportation screener fairly and reasonably represented her wage-earning capacity as of December 7, 2009.

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

¹¹ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (2) (October 2009),

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 28, 2010 be affirmed.

Issued: July 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board